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No. 80-616

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES K. MCGOVERN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Bifulco v. *United States*, No. 79-5010 (June 16, 1980) 1

Colorado v. *Bannister*, No. 79-1901 (Oct. 20, 1980) 4

Coolidge v. *New Hampshire*, 403 U.S. 443 4

Delaware v. *Prouse*, 440 U.S. 648 ..... 3, 4

Erwin v. *United States*, cert. denied, 444 U.S. 1071 3

Harper v. *United States*, cert. denied, No. 79-1863 (Oct. 6, 1980) 3

Harris v. *United States*, 390 U.S. 234 4

United States v. *Arra*, 630 F. 2d 836 4

United States v. *Hilton*, 619 F. 2d 127, cert. denied, No. 79-1732 (Oct. 6, 1980) 4

United States v. *Piner*, 608 F. 2d 358 ..... 4, 5

United States v. *Warren*, 578 F. 2d 1058, cert. denied, No. 79-6217 (May 19, 1980) 3

United States v. *Williams*, 617 F. 2d 1063 ..... 3, 4

Constitution, statutes and rule:

United States Constitution, Fourth Amendment 1, 3, 4

14 U.S.C. 89(a) 3, 4

21 U.S.C. 846 1

21 U.S.C. 963 1

Fed. R. Crim. P. 35 1

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Petitioners contend that the suspicionless boarding of an American flag vessel on the high seas by Coast Guard officers, for purposes of a safety and documentation check, violates the Fourth Amendment.

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted on one count of conspiracy to import and to possess with intent to distribute marijuana, in violation of 21 U.S.C 963 and 846. Petitioners were each sentenced to two years' imprisonment and a five-year special parole term.[1] The court of appeals affirmed (Pet. App. A-1).

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[1]Petitioners have not challenged their special parole terms. However, in *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980), this Court recently held that a special parole term may not be imposed as part of a sentence for narcotics conspiracy. Petitioners may move for correction of their sentences in the district court under Rule 35, Fed. R. Crim. P.

1. Prior to trial, petitioners moved to suppress evidence seized by Coast Guard officers following the boarding of their vessel off the Florida Coast. The evidence established that at about 8:30 a.m. on May 15, 1978, the Coast Guard Cutter STEADFAST, under the command of Douglas Currier, was on patrol in the Gulf of Mexico about 50 miles west of Naples, Florida, when a sailing vessel was sighted about seven miles away (H. Tr. 20-21; II Tr. 44-45, 67-68, 78).[2] Commander Currier ordered the STEADFAST to approach the sailboat for a routine investigation (H. Tr. 21; II Tr. 68). Once the cutter neared the sailing ship, it was determined that the vessel was named the SEA TRUMPF and its home port was New York (H. Tr. 21; II Tr. 69). Commander Currier made radio contact with the SEA TRUMPF, and asked for its last and next ports of call. The response was that it had come from Curacao and was going to Tampa and then Mexico (H. Tr. 22; II Tr. 69-70). Commander Currier then advised the SEA TRUMPF to stand by for a Coast Guard boarding (H. Tr. 22; II Tr. 70).

Once on the SEA TRUMPF, Coast Guard Lt. Kelly, the officer in charge of the boarding party, identified himself and informed petitioner James McGovern that he and his crew had boarded under the authority of 14 U.S.C. 89(a), which gives the Coast Guard the power to board any United States vessel on the high seas. Officer Kelly then asked to see the vessel's documentation papers as well as identification for each crew member (H. Tr. 90-91; II Tr. 109-110). While he was reading the documentation papers, Lt. Kelly looked up and observed through the open cabin doors a number of bales wrapped in trash bags; the bales emitted a strong odor of marijuana (H. Tr. 91; II Tr. 111-112). A field test of the substance inside the bales confirmed that it was marijuana (H. Tr. 95; II Tr. 112). The vessel was then seized and all

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[2]"H. Tr." refers to the suppression hearing transcript. "Tr." refers to the trial transcript.

three crew members were arrested (H. Tr. 95-96; II Tr. 74-75). Approximately 180 bales of marijuana, weighing about 9,000 pounds, were recovered from the SEA TRUMPF.

2. Petitioners contend that the boarding of the SEA TRUMPF violated their Fourth Amendment rights because it was unsupported by probable cause or reasonable suspicion. The court of appeals in this case affirmed the district court's denial of petitioners' suppression motion on the basis of its earlier en banc decisions in *United States* v. *Williams*, 617 F. 2d 1063 (5th Cir. 1980), and *United States* v. *Warren*, 578 F. 2d 1058 (5th Cir. 1978), cert. denied, No. 79-6217 (May 19, 1980), in which it had held that Coast Guard officers acting pursuant to 14 U.S.C. 89(a) may, consistent with the Fourth Amendment, stop and board American vessels without probable cause or reasonable suspicion, for the limited purpose of conducting a safety and documentation inspection. This Court has recently declined, on several occasions, to review similar claims that the Fourth Amendment was violated by warrantless and suspicionless boardings of vessels on the high seas by Coast Guard officers conducting safety and documentation checks. See *Erwin* v. *United States*, cert. denied, 444 U.S. 1071 (1980); *Warren* v. *United States*, cert. denied, No. 79-6217 (May 19, 1980); *Harper* v. *United States*, cert. denied, No. 79-1863 (Oct. 6, 1980). There is no greater reason to grant review here.

Relying primarily on *Delaware* v. *Prouse*, 440 U.S. 648 (1979), petitioners argue that the stopping and boarding of their vessel violated the Fourth Amendment because the Coast Guard officers acted without reasonable and articulable suspicion that the vessel was not in compliance with

safety and documentation requirements, or that either the vessel or its crew were "otherwise subject to seizure for violation of law." *Id.* at 663. In our view, the rule of *Prouse*—prohibiting suspicionless stops of automobiles for registration checks—should not be applied uncritically to boardings of vessels at sea. In light of the important governmental interests in enforcing the numerous laws applicable to vessels on the high seas (including documentation and licensing requirements, marine safety and navigation laws, and fisheries conservation and management laws), the practical difficulties involved in law enforcement at sea, and the reduced expectations of privacy of those on board American flag vessels because of the pervasive nature and long history of maritime regulation, the courts of appeals have correctly held that the limited intrusion upon legitimate privacy interests occasioned by boardings conducted under the authority of 14 U.S.C. 89(a) is not unreasonable within the meaning of the Fourth Amendment. See *United States* v. *Arra*, 630 F. 2d 836, 840-842 (1st Cir. 1980); *United States* v. *Hilton*, 619 F. 2d 127, 131-133 (1st Cir. 1980), cert. denied, No. 79-1732 (Oct. 6, 1980); *United States* v. *Williams, supra*, 617 F. 2d at 1079-1084. Here, Lt. Kelly was on board the SEA TRUMPF for the limited and proper purpose of conducting a documentation and safety inspection pursuant to Section 89(a). Hence, the contraband which he observed in plain view while conducting the documentation check was properly seized and admitted into evidence. See, *e.g.*, *Colorado* v. *Bannister*, No. 79-1901 (Oct. 20, 1980); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465-472 (1971); *Harris* v. *United States*, 390 U.S. 234 (1968).

Nor, contrary to petitioners' contention (Pet. 10), does the decision in this case conflict with that of the Ninth Circuit in *United States* v. *Piner*, 608 F. 2d 358 (1979). In *Piner* the court held that the Fourth Amendment was violated by the warrantless and suspicionless boarding of a

vessel by Coast Guard personnel for a safety and documentation inspection, but only because in that case the boarding took place after dark. The court assumed arguendo that "the governmental interest in securing compliance with safety regulations outweighs the intrusion on privacy encountered in the ordinary boarding" (608 F. 2d 361), but it held that the governmental interest could be sufficiently protected by random daytime boardings and did not justify the increased "subjective intrusion" of suspicionless boardings of vessels after dark. Since the boarding in this case took place during daylight hours, there is no conflict with *Piner*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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